87-165

Supreme Court, U.S.
FILED
JUL 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DAVID ALLEN LOGAN,

PETITIONER

vs.

WILLIAM ABSHIRE, WARDEN,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT
COURT OF APPEALS

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QUESTIONS PRESENTED

I. WAS PETITIONER DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO FAIR NOTICE OF THE CHARGES AGAINST HIM WHERE THE JURY INSTRUCTIONS CONSTRUCTIVELY AMENDED THE STATE CHARGING DOCUMENT?

II. WAS PETITIONER DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BY THE TRIAL JUDGE'S REFUSAL TO GRANT HIS REQUEST FOR A JURY INSTRUCTION ON A LESSER INCLUDED OFFENSE?

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IN THE SUPREME COURT OF THE UNITED STATES
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DAVID ALLEN LOGAN,
PETITIONER

vs.

WILLIAM ABSHIRE, WARDEN,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

NOW COMES David Allen Logan, Petitioner, through his attorney, R. Steven Whalen, and asks this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause on May 28, 1987.

OPINIONS BELOW

The opinion of the Federal District Court for the Eastern District of Michigan is appended as Appendix A. The opinion of the Sixth Circuit Court of Appeals is appended as Appendix B. The opinion of the Michigan Court of Appeals is appended as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on May 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the

> right ... to be informed of the nature and cause of the accusation."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner David Allen Logan was convicted by a jury in the Macomb County, Michigan Circuit Court of first-degree murder, M.C.L. 750.316; M.S.A. 28.548. He was sentenced to a mandatory life sentence. On August 25, 1976, the Michigan Court of Appeals remanded the case for entry of a judgment of guilty of second-

degree murder. Petitioner was then sentenced to life imprisonment for that offense.

Petitioner was charged in an Information with first-degree felony murder. The charge arose from the shooting death of Nicholas Zerilli on August 12, 1974, during an attempted robbery of the deceased's warehouse in Centerline, Michigan. Although there was no identification made, and although there was no physical evidence at the time to connect Petitioner to the robbery, Petitioner turned himself in to the Centerline police on the advice of his attorney. He made a confession which led police to physical evidence which was admitted at trial.

The facts as adduced at trial indicated that Petitioner and an accomplice entered the Tasty Tim Creamery warehouse and ordered Mr. Zerilli to lie on the ground where he was to be tied up.

When Petitioner became distracted by a child screaming in the warehouse office, he entered the office to try and calm the child. "Ten seconds" later the victim got up off the ground and threatened his assailants with a .38 caliber pistol he had hidden under his shirt. In Petitioner's confession he stated: "All of a sudden I seen him with a gun." The victim ordered his assailants to "freeze" and at this time Petitioner was "right in his line of fire."

Petitioner testified that about the time the deceased fired his handgun, he shot the deceased in self-defense. The evidence indicated that Mr. Zerilli had indeed fired his handgun at a point when he and Petitioner were about 15 feet apart. After the shooting, Petitioner and his accomplice left without taking any money, running through an unopened glass door.

Petitioner's principal defense to the felony murder charge was intoxication. Petitioner testified that he was high from drugs and alcohol, and that he had a long history of substance abuse which resulted in several convictions. He stated that he started this episode of use of drugs Friday, August 9th, or Saturday, August 10th, by ingesting mescaline, alcohol and smoking marijuana. On Monday the 12th of August he had many beers and smoked marijuana prior to deciding to go to the Tasty Tim's Creamery. He explained that he did not tell the police about this drinking and drug taking because he thought they would go easier on him.

A neighbor of the Petitioner saw the alleged co-actor go into Petitioner's house the day of the shooting. He knew that Petitioner had been having problems with drunkenness and drug use and had

seen the Petitioner a couple of days prior to the offense acting in a drunken manner. Defense counsel stressed the theory of intoxication in his closing argument to the jury.

In his closing argument, defense counsel admitted that Petitioner was guilty of some lesser crime, but argued for acquittal on the charged offense.

In his instructions to the jury, the trial judge defined "premeditation and deliberation" in detail and told the jury that "murder in the first degree means a cold-blooded, premeditated, deliberate, unjustifiable and inexcusable homicide with malice."

The judge refused Petitioner's request for instructions on the lesser included offenses of second-degree murder and manslaughter.

After receiving instructions, the jury returned to the courtroom saying it

was "hung up" on the definition of premeditation. Although the judge stated outside the jury's presence that premeditation was not an issue at trial, he reread the definitions of premeditation and deliberation to the jury and ignored the prosecutor's request that the jury be instructed that the element of premeditation had no bearing on its deliberations.

The jury returned a verdict of guilty of first degree murder, which was later reduced to second degree murder on remand from the Michigan Court of Appeals.

Following appeals in the Michigan system, Petitioner brought a petition for writ of habeas corpus in the Federal District Court for the Eastern District of Michigan, pursuant to 28 U.S.C. §2254, raising several issues. The District Court granted the writ conditionally, on the basis of Sandstrom v. Montana, 442 U.S. 510; 61 L.Ed.2d 39;

99 S. Ct. 2450 (1979). The Sixth Circuit reversed, and remanded the case for consideration of the remaining issues. Logan v. Abshire, 778 F.2d 283 (6th Cir. 1985). On August 29, 1986, the District Court denied the writ. Petitioner took an appeal to the Sixth Circuit, which affirmed the District Court in a per curiam opinion filed on May 28, 1987.

REASONS FOR GRANTING THE WRIT

A. Under Michigan law, M.C.L. 750.316; M.S.A. 28.548, there are two forms of first-degree murder: premeditated murder and felony murder. Each contains exclusive elements which the other does not.

Petitioner was charged with felony murder. At no time was the Information amended to reflect a charge of premeditated murder. Nevertheless, the trial judge repeatedly instructed the jury on

elements of premeditated murder, even over the prosecutor's objections. Significantly, he reinstructed on premeditated murder, over both defense and prosecution objection, when the jury sent a note saying it was "hung up" on the definition of premeditation.

The Federal District Court found that these instructions were an improper constructive amendment of the state court Information, but that the error was harmless. The Sixth Circuit, citing Sumner v. Mata, 449 U.S. 539; 66 L.Ed.2d 722; 10 S.Ct. 764 (1981), adopted the Michigan Court of Appeals' finding that the judge's instructions "merely gave the jury a background explanation of murder theory."

Sumner v. Mata, supra, held that 28 U.S.C. §2254(d) creates a presumption of correctness of state court factual determinations. However, the question of whether the trial judge's instructions had

the effect of a constructive amendment or a background explanation of murder theory is an issue of law, not of fact. Therefore, Sumner v. Mata is inapplicable. And even if the Michigan Court of Appeals' finding were deemed a factual determination, the record of the state court proceeding, considered as a whole, does not fairly support it, and hence it is not presumptively binding on a federal habeas court. Sumner v. Mata, supra, 449 U.S. at 545; 28 U.S.C. 2254(d)(8).

The Sixth Circuit is therefore in conflict with this Court's decision in Sumner v. Mata, supra.

The constructive amendment of a state court charging document implicates the Sixth Amendment right to fair notice of criminal charges and the Fifth Amendment protection against double jeopardy, both of which are applicable to the states through the due process clause of the

Fourteenth Amendment. In re Oliver, 333 U.S. 257; 68 S.Ct. 499; 92 L.Ed.2d 682 (1948). At least two federal circuits have held that the constructive amendment of a state court Information is per se reversible error, without the necessity of the defendant showing specific prejudice. Watson v. Jago, 558 F.2d 330 (6th Cir. 1977); Gray v. Raines, 662 F.2d 569 (9th Cir. 1981). Both circuits analogized to Stirone v. United States, 361 U.S. 212; 4 L.Ed.2d 252; 80 S.Ct. 270 (1960), which was based on the Fifth Amendment guarantee of a grand jury indictment.

This Court has not addressed the issue of whether, as a matter of due process, prejudice is presumed from the constructive amendment of a state charging document. This is an important question of federal law which has not been, but should be, settled by this Court.

B. While there was legally sufficient evidence to convict Petitioner of felony murder, there was also evidence which would have supported a jury instruction on the lesser included offense of manslaughter. The trial judge erred in not giving the manslaughter instruction requested by the defense. [1]

In Beck v. Alabama, 447 U.S. 625; 100 S.Ct. 2382; 65 L.Ed.2d (1980), the Supreme Court held that in a capital case, the failure to give lesser included offense instructions violates the due process clause of the Fourteenth Amendment by en-

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1. Petitioner's principal defense to the felony murder charge was intoxication. That itself is a mitigating factor which will reduce murder to manslaughter. People v. Droste, 160 Mich. 66, 79; 125 N.W. 87 (1910). Also, based on trial testimony that at one point the victim drew a pistol on the Petitioner, the Petitioner had a colorable claim of "imperfect self-defense," which under Michigan law will reduce murder to manslaughter. People v. Springer, 100 Mich. App. 418, 421; 298 N.W.2d 750 (1980).

hancing the risk of an unwarranted conviction. The Court expressly declined to reach the question of whether the same rule holds true in a noncapital case. Id., 65 L.Ed.2d at 403, fn. 14. However, the reasoning of Beck is logically applicable to noncapital offenses.

Citing Keeble v. United States, 412 U.S. 205; 93 S.Ct. 1993; 36 L.Ed.2d 844 (1973), Justice Stevens in Beck explained that "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." Beck v. Alabama, supra, 65 L.Ed.2d at 400. Beck went on to note that federal law and state law (with the exception of Alabama) were unanimous in giving defendants the right to a lesser included instruction where the evidence so warranted.[2] Reflecting on

2. The Supreme Court cited the Michigan case of

this consensus, the Beck Court stated:

> "While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense — the failure to give the jury the third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." 65 L.Ed.2d at 402-403 (Emphasis added).

Furthermore, in Keeble v. United States, supra, the Supreme Court alluded to the constitutional implications of

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2. (Footnote contiued)

People v. Ora Jones, supra, in support of this observation. 65 L.Ed.2d at 402, fn. 12.

denying a request for a lesser-included instruction:

> "Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right to a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that a construction of the Major Crimes Act to preclude such an instruction would raise difficult constitutional questions. In view of our interpretation of the Act, those are questions that we need not face."

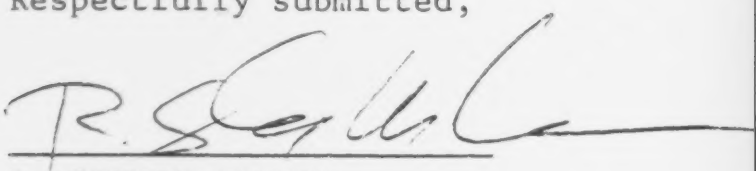
Beck and Keeble strongly suggest that giving a lesser-included instruction where evidentially supported is a requirement of Fourteenth Amendment due process. Applied to the present case, the refusal to instruct on manslaughter enhanced the possibility of an unwarranted conviction.

This too is an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

For the reasons stated, Petitioner asks this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,



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Dated: July 22, 1987

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID A. LOGAN,
Petitioner,

v. CIVIL ACTION NO. 84CV-1945-DT

WILLIAM ABSHIRE, HONORABLE GEORGE WOODS
Respondent. /

MEMORANDUM OPINION AND ORDER

This case is on remand from the Sixth Circuit Court of Appeals. On February 25, 1976, Petitioner, David Allen Logan, was convicted by a jury in Macomb County Circuit Court of first-degree felony-murder, Mich. Comp. Laws § 750.316. He was sentenced to life imprisonment.

The Michigan Court of Appeals reversed and remanded the case for entry of a judgment of second-degree murder or retrial at the option of the prosecutor. (Docket No. 23808). On October 6, 1976, Petitioner was "resentenced" to life im-

prisonment after the entry of a judgment of guilty of second-degree murder. He subsequently filed a motion for new trial in Macomb County Circuit Court which was denied on August 5, 1981. (Docket No. 74-742-FY). The Michigan Court of Appeals denied Petitioner's delayed application for leave to appeal on November 30, 1981. (Docket No. 59790). Petitioner's second application for delayed leave to appeal was denied by the Court of Appeals in an order dated July 11, 1983. (Docket No. 69696). On March 9, 1984, the Michigan Supreme Court also denied Petitioner's second delayed appeal. (Docket No. 72197).

Petitioner filed his application for writ of habeas corpus on April 23, 1984, raising six claims. This Court conditionally granted the writ on the basis of Petitioner's first claim that he was denied a "fundamentally fair trial by the jury instruction that the law presumes

every person intends the natural consequences of his conduct." Civil Action No. 84-CV-1945-DT. See Sandstrom v. Montana, 442 U.S. 510 (1979). The Court did not address the remaining five issues. On December 9, 1985, the Sixth Circuit Court of Appeals reversed the judgment as to Petitioner's Sandstrom claim and remanded the case. Logan v. Abshire, 778 F.2d 283 (6th Cir. 1985). This Court entered an order on April 11, 1986, denying the petition and returning the case to the active docket for "consideration of the alternative grounds advanced by Petitioner."

A.

Petitioner's first remaining claim is that he was denied his constitutional right to due process of law because the trial court denied his request for an instruction on the lesser included offense of manslaughter. The Sixth Circuit summarized the facts of the case as follows:

On August 12, 1974, Nicholas Zerilli, the owner of Tasty Tim Ice Cream Company, was fatally shot during an armed robbery attempt at his warehouse located in Centerline, Michigan. The facts reveal that on the evening in question, the [petitioner] (armed with a thirty-ought-six rifle), and an accomplice entered the warehouse and ordered Mr. Zerilli to lie on the ground. Mrs. Zerilli, who witnessed the holdup, hid in the bathroom until she heard her four-year old son screaming. She left the bathroom and told the men that she was the boy's mother. The accomplice carried an eight to ten inch double-edged knife. Seconds later, Mr. Zerilli had gotten up off the ground and drawn a .38 caliber pistol. Mr. Zerilli ordered his assailants to "freeze." Mrs. Zerilli grabbed her son and fled to the bathroom. [Petitioner] then shot Mr. Zerilli and fled.

The record discloses that two days later the [petitioner] surrendered himself to the police. He made a voluntary statement to the police admitting that he took his father's rifle and loaded it in order to rob Tasty Tim's. [Petitioner] admitted that he planned the robbery for about a week prior to the fatal events. He described concealing the rifle and the black masks worn by him and

> his accomplice under his coat. Additionally, the [petitioner] said that he was not under the influence of drugs or alcohol.
>
> The rifle was found where the [petitioner] told police that he had discarded it. [Petitioner's] fingerprints were found on the gun. Material was found in the [Petitioner's] home which matched the material of the masks worn by the assailants. [Petitioner's] principal defense at the time of trial was intoxication.
>
> We believe that the District Court erred in granting the conditional writ. It would have the effect of requiring the State of Michigan to agree to reduce the conviction to manslaughter or, in the alternative, would have required retrial. Our study of this record does not show that either these dispositions are appropriate. This case was well tried. The facts as proved before the jury show a planned and deliberate robbery with a loaded gun in the course of which the owner of Tasty Tim Ice Cream Company was fatally shot by this [Petitioner].

778 F.2d at 283-284 (Emphasis added).

The court found that no rational juror could have concluded that Petitioner

lacked the requisite intent for felony-murder, thus the Sandstrom instruction was harmless.

In light of the Sixth Circuit's determination, Petitioner's instant claim concerning a manslaughter instruction merits no relief. Considering the strong evidence of a "planned and deliberate" crime, the trial court's failure to instruct on the lesser included offense did not prejudice Petitioner.

B.

Petitioner next contends that he was denied his due process rights because defense counsel, without a recorded waiver by Petitioner of his right to a jury trial on the question of his involvement in the killing, essentially admitted his guilt to the charged offense. Defense counsel argued that while Petitioner did kill someone, he lacked the requisite intent necessary for felony murder and thus,

was guilty of a lesser included offense, such as manslaughter. (Tr. 397-398).

"Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney." Estelle v. Williams, 425 U.S. 501, 512 (1976). A defense attorney is not acting ineffectively, thus denying his client's constitutional rights, by arguing guilt to a lesser included offense. In McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984), the court held that in view of the overwhelming evidence that the defendant had killed the victim, the argument by defense counsel suggesting that the defendant was guilty of manslaughter and not first-degree murder was a proper tactical decision which was not violative of the defendant's constitutional rights.

In the instant case, Petitioner admitted killing the victim. (Tr. 345). He also stated that he had thought of the robbery a week before it took place. (Tr. 353). Likewise, as noted by the Sixth Circuit, Petitioner made a statement to the police that he took his father's rifle intending to rob Tasty Tim's. In light of this evidence, counsel did not commit an error of constitutional dimension by "admitting" the killing and focusing on the level of intent. See United States v. Trapnell, 638 F.2d 1016, 1028 (7th Cir, 1980).

Trial counsel may, where the circumstances are not exceptional, adopt a defense strategy without prior consultation with the accused which precludes the accused from asserting a constitutional right. Henry v. Mississippi, 379 U.S. 443, 451-452 (1965). This Court notes, however, that to the extent Petitioner

testified and admitted his involvement in the robbery-murder, he consented to defense counsel's strategy. Indeed, Petitioner stated at trial that he was drunk at the time of the crime and hadn't intended to kill anyone. Petitioner constructively "waived" his right to a jury trial on the questions of his involvement. See e.g. People v. Wise, 134 Mich. App. 82, 351 N.W.2d 225 (1984) (defendant, by admitting to the breaking and entering at trial, consented to defense counsel's concession of guilt on a lesser included offense).

Counsel in the instant case did not concede guilt on the most serious charge against petitioner. He instead "conceded guilt on a lesser offense hoping to win acquittal on the more serious charge." People v. Wise, 134 Mich. App. at 99. Cf. Earl Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), cert. denied, 454 U.S. 1091

(1981) (finding a constitutional violation where defense counsel conceded guilt on the most serious charge against the Petitioner). Although an on-the-record inquiry to see if Petitioner consented to the defense is preferable, due process does not require it. Elmer Wiley v. Sowders, 669 F.2d 386 (6th Cir. 1982). Under the instant facts, Petitioner's claim merits no habeas corpus relief.

C.

Petitioner was charged in the Information with the offense of first-degree felony-murder. At the time of Petitioner's trial, first-degree felony murder under Michigan law could be established by proving that the defendant committed a murder - a homicide committed with "malice aforethought" - in the course of perpetrating a felony enumerated under Mich. Comp. Laws § 750.316. See People v. Aaron,

409 Mich. 672, 713 (1980). Under the common law felony-murder rule, the intent to commit the underlying felony constituted one form of malice sufficient to establish the felony-murder. Aaron at 721-723.

At no time was the Information amended to reflect a charge of premeditated murder. Petitioner claims, however, that the trial court repeatedly instructed the jury on the law of premeditated murder which had the effect of constructively amending the information to include premeditated murder and denying Petitioner due process of law. (Tr. 422, 445-46). "Here ... the charge to the jury included instructions on both premeditated and felony-murder. Since it is impossible to determine whether the jury's verdict was premised on a theory of felony murder, the conviction must be reversed and a new trial ordered free of constitutional error." See Petitioner's Habeas Petition.

This Court recognizes that the trial court's instructions did constructively amend the information, thus denying Petitioner fair notice of the charges against him. However, there is a question whether this error prejudiced Petitioner.

The majority of cases have required a showing of prejudice before granting the writ on grounds of violating the right to fair notice. In Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), the petitioner was indicted by an Ohio grand jury of first-degree premeditated murder. At trial, he claimed self-defense. After reading the indictment to the jury, however, the prosecutor told the jury in his opening statement that the evidence would convince them that the petitioner had murdered the victim during the course of a robbery. Defense counsel then moved to dismiss the indictment on the ground that the petitioner's right to notice had been violated

by the prosecutor's injection of a felony-murder theory when the indictment charged only first-degree premeditated murder. In reply, the prosecutor argued that premeditated murder and felony-murder were both first-degree and that the indictment, by charging first-degree murder, included felony-murder. The trial court then overruled the motion to dismiss. Much of the prosecutor's case focused on the possible robbery. After the prosecution rested, however, it requested the trial court not to charge the jury on first-degree felony-murder. Defense counsel objected, arguing that it would preclude defense counsel from talking about what he had tried to establish on cross-examination, i.e., that there was no robbery at the time of the shooting. The trial court instructed the jury on premeditated murder and not on felony murder. The jury eventually found him guilty of second-degree murder. The

Sixth Circuit not only found that he had been denied fair notice of the criminal charges against him, but that he had actually been prejudiced. "The fact that the charge to the jury only included first-degree ... murder according to the indictment could not cure the prejudice ..." 558 F.2d at 339. See Gary v. Raines, 662 F.2d 569, 574 (9th Cir. 1982) (considering whether the error was harmless before granting habeas relief), and Koontz v. Glossa, 731 F.2d 365 (6th Cir. 1984) (prejudice where charges amended before trial gave the petitioner only three days to develop a new defense). But see Stirone v. United States, 361 U.S. 212 (1960) (finding constructive amendment per se reversible), and Tarpley v. Estelle, 703 F.2d 157 (5th Cir. 1983), cert. denied, 464 U.S. 1002 (1983) (ruling without considering prejudice).

Watson could be read to support the position that such an error is per se prejudicial: "[A]s a matter of law, appellant was prejudiced by the constructive amendment. See Stirone, supra., 558 F.2d at 339." Such a reading does not necessarily follow, however. The Supreme Court has recently stated that the prejudice per se standard is to be used sparingly. Rose v. Clark, 106 S. Ct. 3010 (1986); Delaware v. Van Arsdall, 106 S.Ct. 1431 (1986). The present issue is not the type that should employ a per se reversible error analysis.[1]

---

1. This Court notes that, in any event, Stirone, supra, was based on the Fifth Amendment guarantee of the right to a grand jury which has never been applied to the states through the Fourteenth Amendment. Watson, supra, 558 F.2d at 337. The instant issue involves a Fourteenth Amendment right to fair notice.

This Court finds that in the instant case the error did not prejudice Petitioner. Petitioner's defense was not compromised by the alleged "constructive amendment." Even if premeditated murder had been included in the indictment, Petitioner could not have done anything differently which would have altered the results of the trial. His intoxication defense was appropriate for rebutting the intent elements of either premeditated or felony murder. This Court notes that in any event there was ample evidence for a conviction on either charge. Thus, Petitioner's third claim constitutes harmless error.

D.

Petitioner next contends that the Michigan Supreme Court's refusal to retroactively apply People v. Aaron, supra., (abolishing the felony-murder doctrine in Michigan) to his case violates his rights

to due process and equal protection. The Michigan courts have ruled Aaron be applied prospectively only. People v. Wilson, 411 Mich. 990 (1981); People v. Fuzi #1, 116 Mich. App. 246, 323 N.W.2d 354 (1982). Federal courts have ruled that the United States Constitution does not require that Aaron be applied retroactively. O'Guin v. Foltz, 715 F.2d 397, 399-400 (6th Cir. 1983); Shepard v. Foltz, 771 F.2d 962 (6th Cir. 1985); Bowen v. Foltz, 763 F.2d 191 (5th Cir. 1985); King v. Mintzes, 559 F.Supp. 409 (E.D. Mich. 1983).

E.

Petitioner's final claim also involves his right to fair notice; he contends that there was no common-law felony-murder rule in Michigan prior to People v. Aaron, thus the offense was never clearly defined and he was denied his due process right to "real notice of the true charge against him." Henderson v. Michigan, 426 U.S. 637,

645 (1976).

This claim must be rejected for two reasons. First, Petitioner has never claimed that he lacked notice of second-degree murder. Since he now stands convicted of second-degree murder (See Michigan Court of Appeals Opinion No. 23808) and not felony-murder, this particular notice claim is moot. Second, as stated in Durland v. United States, 161 U.S. 306, 315 (1896), "if defendant had desired further specification and identification, he could have secured it by demanding a bill of particulars." Petitioner did not demand such a bill nor has he alleged prejudice concerning the lack of notice. Accordingly,

IT IS ORDERED that the remaining issues in the petition are DENIED for lack of merit.

/s/ George E. Woods

GEORGE E. WOODS
UNITED STATES DISTRICT COURT

Dated: 8/29/86

No. 86-1906

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID ALLEN LOGAN,

Petitioner-Appellant,

v.

WILLIAM ABSHIRE,

Respondent-Appellee.

/

On Appeal from the
United States District Court
for the Eastern District of Michigan.

Before: LIVELY, Chief Judge; ENGEL and KRUPANSKY, Circuit Judges.

PER CURIAM. David Allen Logan appeals the denial of his petition for a writ of habeas corpus by the United States District Court for the Eastern District of Michigan.

Logan was convicted of first degree murder in 1976 and was sentenced to life imprisonment by the Macomb County, Michigan, Circuit Court. The Michigan Court of Appeals remanded for entry of a judgment of guilty of second degree murder, and

Logan was sentenced to life imprisonment. After exhausting his state remedies, Logan brought a petition for writ of habeas corpus in the United States District Court of the Eastern District of Michigan. The court conditionally granted the writ based on an instructional error under Sandstrom v. Montana, 442 U.S. 510 (1979), without addressing Logan's remaining issues. This court then reversed the district court's judgment as to the Sandstrom claim and remanded. Logan v. Abshire, 778 F.2d 283 (6th Cir. 1985). On remand, the district court considered the remaining issues and denied the petition.

On appeal, Logan argues that the writ should be granted because (1) the jury instructions constructively amended the information and deprived him of his Sixth and Fourteenth Amendment right to notice of the charges; (2) failure to instruct

on the lesser included offense of manslaughter denied him due process; (3) defense counsel's admission to the jury that Logan was guilty of something, without having obtained a record waiver, denied him due process; (4) the trial court's instructions denied him due process; and (5) failure to apply People v. Aaron, 409 Mich. 572, 299 N.W.2d 304 (1980), retroactively denied him due process, equal protection, and the right to a jury trial.

Logan's counsel strenuously urges before us on appeal that the trial court's determination that there had been a constructive amendment of the information upon which he was tried was error of constitutional dimension and incapable either of cure or of application of the harmless error rule under our court's holding in Watson v. Jago, 558 F.2d 330 (6th Cir. 1977). Upon a careful review of the entire record, we are led to agree with the

state that the instructions complained of did not result in a constructive amendment of the information in any event. While hardly a model of clarity, we conclude, as did the Michigan Court of Appeals, to whom that issue was addressed, that the trial judge's references to premeditation and other elements of first degree murder were primarily illustrative and given in light of arguments made on behalf of Logan that his state of intoxication precluded any such consideration:

> A reading of the instructions as a whole shows that the trial judge merely gave the jury a background explanation of murder theory. He did not suggest that the evidence would support a finding of deliberation and premeditation. Further, the record shows that the defendant requested that an instruction of that type be given...

People v. Logan, No. 23808, Michigan Court of Apepals, Aug. 25, 1976, p. 2.

We find ourselves in agreement with

the Michigan Court of Appeals in this regard and accept its findings in all events under Sumner v. Mata, 449 U.S. 539 (1981). We find the remainder of petitioner's assertions of error to be without merit and to require no further explanation than that already adequately given by the United States District Judge George E. Woods in his opinion filed in the district court on August 29, 1986. Petitioner's claim of error of failure to apply People v. Aaron, 409 Mich. 572 (1980) is, as Judge Woods pointed out, foreclosed by our court's decisions in O'Guin v. Foltz, 715 F.2d 397 (6th Cir. 1983) and Shepard v. Foltz, 771 F.2d 962 (6th Cir. 1985).

The judgment of the district court is AFFIRMED.

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs- No. 23808

DAVID ALLEN LOGAN,
Defendant-Appellant. /

BEFORE: Allen, PJ; and Holbrook, Jr., and Papp, JJ.

PER CURIAM

Defendant was convicted of first-degree murder, MCLA 750.316; MSA 28.548, and sentenced to life in prison. This is an appeal as of right.

Defendant argues that the conviction must be reversed because the trial judge instructed the jury on the now discredited capacity standard intoxication defense. See, e.g., People v Crittle, 390 Mich 367; 212 NW2d 196 (1973). A careful review of the record reveals that the defendant actually requested two instructions dealing with intent and intoxication. The first

stated that the jury should acquit the defendant if it found that he had been incapable, because of intoxication, of forming the requisite intent. The second stated that the defendant should be acquitted if, because of intoxication, he did not, in fact, possess the requisite intent. The trial judge gave both instructions as requested. While the capacity standard has been disapproved, we find no case holding prejudicial error when the instruction was requested by the accused. It is incongruous that one could ask for an instruction and then take advantage of the situation by claiming error. Since the jury was clearly informed that the defendant should be acquitted if he never actually formed the requisite intent, we must conclude that the jury was not misled. Therefore, mention of the capacity standard was not reversible error. People v Scott, 55 Mich App 735; 223 NW2d 330

(1974).

The defendant's conviction was based upon a showing of a felony murder. There was never any allegation of deliberation or premeditation. Nevertheless, the judge instructed at some length on that alternative form of first-degree murder. On appeal, the defendant argues that the instructions confused the jury and deprived him of a fair trial. A reading of the instructions as a whole shows that the trial judge merely gave the jury a background explanation of murder theory. He did not suggest that the evidence would support a finding of deliberation and premeditation. Further, the record shows that the defendant requested that an instruction of that type be given. We do not believe that the instruction was reversibly erroneous.

Subsequent to the trial in this case, the Supreme Court released its decisions in People v Carter, 395 Mich 434; 236

NW2d 500 (1975), and several companion cases. One important holding in Carter was that felony murder is common-law murder (second-degree murder in our statutory scheme) aggravated by the perpetration or attempted perpetration of one of the enumerated felonies, i.e., second-degree murder is a necessarily included offense of felony-type first-degree murder. With that holding in mind, the defendant argues that the trial judge's jury instructions on felony murder were reversibly erroneous in the present case. We disagree. While the judge's instructions were hardly a model of clarity -- and might require reversal in a post-Carter trial -- they were adequate in the present context. Here, as in the previously discussed allegations of instructional error, the defendant not only failed to object to the instructions as given, but also affirmatively indicated his approval of some of

the very statements which are now said to be reversibly erroneous. GCR 1963, 516.2.

The defendant's confession was read to the jury following a Walker hearing at which the confession was found to have been voluntarily given. On appeal, the defendant argues that the jury instructions concerning the evidentiary weight to be given to the confession were erroneous. It again appears that there was no objection because the judge instructed the jury in the manner requested by the defendant at trial. In any event, we see no error in the instructions as given. People v Gilbert, 55 Mich App 168; 222 NW2d 305 (1974), cited by the defendant, held that an instruction like that suggested on appeal by the defendant may be given; and that the judge should not tell the jury that a determination of voluntariness has already been made. Neither holding requires reversal in the present

case.

As part of the prosecution case, the officer who discovered incriminating material evidence at the defendant's residence testified about the circumstances leading to that discovery. Following the testimony, the search warrant and the affidavit supporting the request for the search warrant were admitted as exhibits. The defendant now argues that the admission of the exhibits, especially the affidavit, violated the rule that a judge sitting as the trier of fact may not review testimony given at a preliminary examination. People v Ramsey, 385 Mich 221; 187 NW2d 887 (1971).

We are impressed by this argument because there is a clear similarity of spirit between the Ramsey rule and the extension proposed by the present defendant. Nevertheless, we do not believe that reversible error occurred here. Ramsey is

clearly distinguishable on its facts -- in several respects. Further, where Ramsey applies, reversal is mandatory, even if no prejudice can be shown. We do not believe that reversal on the suggested grounds would be appropriate in this case even if the admission of the documents was technically erroneous. Many other cases have declined to extend the Ramsey rule to arguably analogous cases -- motivated, we suspect, by a similar aversion to the mandatory nature of the rule. A partial list includes People v Boyd, 49 Mich App 388; 212 NW2d 333 (1973), and People v Grable, 57 Mich App 184; 225 NW2d 724 (1974).

The defendant's final allegation of error is, in light of People v Carter, supra, his most persuasive one. The defendant was charged with felony murder. He requested instructions on second-degree murder and manslaughter, but the

requests were refused. Carter and its companion cases establish that the refusal was error. Doubts about the applicability of Carter to trials held prior to the release of that decision were resolved -- at least for cases which have not yet completed the appellate process - by the order in People v Dancer, 396 Mich 802; ___ NW2d ___ (1976). We read Dancer as requiring vacation of the defendant's first-degree murder conviction. As in Dancer, we remand for entry of a judgment of guilty of second-degree murder or, at the option of the prosecutor, a new trial on the original charges. If a new trial is held, we suggest that the prosecutor take care to insure that the instructions to the jury are concise and unquestionably accurate statements of the controlling law.

REVERSED and remanded in accordance with this opinion.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v No. 23808

DAVID ALLEN LOGAN,
Defendant-Appellant.
_____/

August 25, 1976

Before: Allen, P.J., and D.E. Holbrook, Jr. and Papp, JJ.

D.E. HOLBROOK, JR., J., Concurring.

I concur in the result and the reason therefor. As to the balance of the opinion I express no opinion.

No.

IN

SUPREME COURT OF

OCTOBER

DAVID ALLEN LOG

V

WILLIAM ABSHI

ON PETITION FOR

TO THE UNITED STATE

FOR THE SI

BRIEF IN O

PETITION FOR WR

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*Counsel of Record

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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THE

THE UNITED STATES

ERM, 1987

N, Petitioner,

E, Respondent.

RIT OF CERTIORARI

S COURT OF APPEALS

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POSITION TO

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QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT'S GIVING THE JURY A BACKGROUND EXPLANATION OF MURDER THEORY AT THE REQUEST OF PETITIONER CONSTRUCTIVELY AMENDED THE INFORMATION AND DENIED PETITIONER FAIR NOTICE OF THE CHARGE AGAINST WHICH HE WAS DEFENDING?

II.

WHETHER THE REFUSAL TO GIVE A MANSLAUGHTER INSTRUCTION WHERE THE FACTS SHOWED THE VICTIM WAS KILLED BY PETITIONER DURING A PLANNED, DELIBERATE ROBBERY WITH A LOADED GUN DEPRIVED PETITIONER OF DUE PROCESS OF LAW?

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OPINIONS BELOW

David Allen Logan, Petitioner is currently in the custody of the Michigan Department of Corrections and incarcerated at the Riverside Correctional Facility, Ionia, Michigan.

On February 27, 1975, Petitioner was tried by a jury and convicted for the August 12, 1974 first degree felony murder in the Macomb County, Michigan Circuit Court, Walter P. Cynar, Judge, as the result of his admitted killing of Nicholas Zerrilli during a robbery of Mr. Zerrilli's business, the Tasty Tim Ice Cream Company. MCLA 750.316; MSA 28.548. Petitioner was thereupon sentenced to natural life imprisonment.

The Michigan Court of Appeals thereafter reversed Petitioner's conviction with instructions to enter a judgment of guilty to second degree murder, MCLA 750.317; MSA 28.549, or, at the option of the prosecutor, a new trial on the original charges. *People* v *Logan*, No. 23808, unpublished *per curiam* opinion (August 25, 1976).

The Macomb County prosecutor thereafter elected to enter a conviction of second degree murder. Petitioner was thereafter re-sentenced to life imprisonment.

Next Petitioner filed an application for leave to appeal in the Michigan Court of Appeals, which was denied for lack of merit in the grounds presented in an unpublished order dated November 30, 1981, *People* v *Logan*, No. 59790.

Petitioner's Application for Leave to Appeal to the Michigan Supreme Court was denied in a published order, *People* v *Logan*, 414 Mich 904 (1982).

Again Petitioner filed a further delayed application for leave to appeal in the Michigan Court of Appeals, which was denied for lack of merit in the grounds presented in an unpublished order dated July 11, 1983. *People* v *Logan*, No. 69696.

Petitioner then filed an application for leave to appeal the decision of the Michigan Court of Appeals to the Michigan Supreme Court, which was denied in a published order. *People* v *Logan*, 418 Mich 968 (1984).

Petitioner then filed a petition for writ of habeas corpus in the United States District Court, Eastern District of Michigan, No. 84-CV-1945-DT. That court issued a conditional writ of habeas corpus in a Memorandum Opinion and Order dated December 19, 1984. The district court denied reconsideration on January 18, 1985.

Timely appeal of that decision was brought to the Sixth Circuit Court of Appeals. On December 9, 1985, the Court of Appeals reversed in a published *per curiam* opinion. *Logan* v *Abshire*, 778 F2d 283 (CA 6, 1985).

On April 11, 1986, the district court, pursuant to the February 7, 1986, mandate of the Court of Appeals, entered its order denying the writ of habeas corpus. At the same time, the district court returned the case to its active docket for consideration of the alternative grounds advanced by Petitioner which were not previously considered by the district court.

On August 29, 1986, the district court filed its second Memorandum Opinion and Order denying the petition for habeas corpus. *Logan* v *Abshire, II*, No. 84-CV-1945, (hereinafter Mem Op II).

On May 28, 1987, the United States Court of Appeals filed a *per curiam* opinion affirming the judgment of the district court denying the petition for writ of habeas corpus. On July 29, 1987, the judgment of the district court issued as a mandate.

JURISDICTION

Respondent agrees with Petitioner's assertion that this Court has jurisdiction to review the May 28, 1987 judgment of the United States Court of Appeals, 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The constitutional provisions involved in this case are the Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth Amendment states in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature of the cause of the accusation ..."

Section One of the Fourteenth Amendment states in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; ..."

STATEMENT OF THE CASE

Nicholas Zerrilli, the owner of the Tasty Tim Ice Cream Company, (T-89) a wholesale business (T-89) worked late on the night of his 27th birthday, August 12, 1974 (T-95), at his Center Line, Michigan location. With him at work was his wife and infant son (T-89). Late that night, just as father, accompanied by his son had finished the repair of a pop machine (T-95), two men entered the building (T-97). One man walked with Mr. Zerrilli (T-97). The other walked in front of Mr. Zerrilli (T-97). The man in front wore a scarf on his face, a small, black silk, babushka (T-98), which appeared like an inverted triangle tied behind his head with eye-holes cut out (T-98). The witness, Mrs. Zerrilli, realized a holdup was occurring; she hid in the office bathroom (T-102); she heard her son, who was less than four (4) years old, screaming (T-100), she heard a man tell her son to "shut-up and i won't hurt you" (T-101). She left the bathroom and told the man who was holding her son that she was the boy's mother (T-101). This second man (T-102, 104), was tall and thin and had long stringy hair (T-102). He was wearing a black mask just like the other man (T-102). He carried an eight to ten inch double edged knife with a white plastic handle in his right hand; the knife was pointed at her (T-103). The second man said "where's the money" (T-104). Mrs. Zerrilli said "in here" referring to the bathroom (T-104). When she next looked, she saw her husband with a revolver pointed toward the rear of the building (T-106). She heard him say "hold it right there" (T-106). The second man, the man with the knife, still had her son (T-106). Mrs. Zerrilli then heard a loud blast (T-106). She looked out through the large glass office window (T-92) into the warehouse and saw a huge

cloud of smoke (T-107). She thought this was her chance to escape. She took hold of her son, entered the bathroom, closed and locked the door (T-107). She just listened (T-107). She heard rapid footsteps and running (T-108). She exited the bathroom, hid her son under the office desk (T-108), and entered the warehouse. She still thought it had been her husband who shot the gun (T-109). She turned the corner and saw her husband laying on the floor (T-109), sprawled out, face up, his mouth and eyes open (T-110). Her son came from the office (T-111). She returned to the office and called the police (T-111).

The evidence disclosed that two days later, Petitioner, accompanied by his attorney and his Aunt and Uncle, surrendered himself to the Center Line (Michigan) Police Department. He made a statement to police, which was determined to be voluntary in a pre-trial hearing. In the statement Petitioner admitted he took his father's thirty-ought-six rifle from his father's closet in order to rob Tasty Tim's. He told how he had planned the robbery for about a week. Petitioner described the robbery was planned to occur at closing time, about 10:30 at night. Petitioner described leaving the house at about 9:00 p.m. for the express purpose of robbing the Tasty Tim Ice Cream Company. He described taking the rifle and concealing it wrapped up under his coat. He and his accomplice went nowhere other than to Tasty Tim's. The two walked to the location, which took about 45 minutes. The rifle was loaded; Petitioner had loaded it before he left. Petitioner described entering the building. He told the authorities how he told Mr. Zerrilli to lie down on the ground so he could tie him up. He related the robbers wore black masks cut out of material, to disguise their identity in the robbery, and that both men wore masks. Petitioner stated he and his accomplice put the masks on just

prior to entering the business. Petitioner observed Mr. Zerrilli with a gun, pointing it at Ray (i.e. the other man). Mr. Zerrilli said "freeze"; Petitioner then stated "he [Zerrilli] was going to shoot me, so I shot him." Petitioner further indicated he was not under the influence of drugs or alcohol. The confession was read into evidence (T-186-235).

At trial, Petitioner testified that "he looked and saw him, Mr. Zerrilli, with a gun." He ran out of the office. "We shot at the same time, about the same time." He also testified on cross-examination that he took the loaded rifle to rob the place (T-352, 353); that he put the mask on just before entering the building because he was not going to carry out the robbery without the mask on (T-355-356).

Other evidence pointed to Petitioner's guilt. His palm print and fingerprints were found on the murder weapon; material found in Petitioner's home matched the material with which the masks were made and masks were found in a coat which Petitioner had stated he threw down in the area he had run through (T-170-174). The rifle was found where Petitioner told police it was discarded (T-155; 227-229).

The Petitioner, while admitting he intended to rob, claimed he was intoxicated. The trial court then instructed the jury (T-411-449). Various instructions dealing with intent and intoxication were requested by the Petitioner and were given by the court. The first stated that the jury should acquit if they found he was incapable because of intoxication of forming the requisite intent. The second was that the Petitioner should be acquitted if because of intoxication he did not possess the requisite intent. The court further instructed the jury, in explanatory fashion, on premeditated

murder. This instruction was given as part of the court's explanation of murder to the jury. The court defined murder (T-420-421) and defined the elements of first degree murder (T-421-423).

The court read the first degree murder statute (T-412), and read the information to the jury (T-411, 412).

The court explained that this case required a finding of a murder occurring in the course of a robbery and the elements necessary thereto (T-424-426).

At the jury's request, and with the approval of Petitioner's trial counsel, and over the objection of the prosecutor (T-438-442), the court again explained the first degree murder statute (T-442-448). The court specifically told the jury that unless they found that the murder in this case occurred during the course, and as a result of the robbery, then they should find Petitioner not guilty (T-447-448).

The jury found the Petitioner guilty as charged.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT'S GIVING THE JURY A BACKGROUND EXPLANATION OF MURDER THEORY AT THE REQUEST OF PETITIONER DID NOT CONSTRUCTIVELY AMEND THE INFORMATION AND DID NOT DENY PETITIONER OF THE RIGHT TO FAIR NOTICE OF THE CHARGES AGAINST WHICH HE WAS DEFENDING.

Petitioner contends that the trial court's instructions constructively amended the information, thus depriving Petitioner of fair notice of the charges against him.

The record reflects that it was Petitioner who sought to have the court instruct the jury on premeditation, deliberation and notice as components of first degree murder (T-410). The record reflects that Petitioner's trial counsel then stated:

> " ... and I believe the court stated that the court wasn't going to charge that, and I want that to be clear." (*Id*) (Emphasis added).

The transcript continues with the court explaining his determination to Petitioner's counsel:

> "THE COURT: No. I think you have. We have discussed it at great length in chambers.

"MR. SIEFER: Okay.

"THE COURT: I have indicated that I was going to define murder to the jury. I was not going to instruct the jury on second degree or manslaughter.

"MR. SIEFER: All right.

"THE COURT: And I am going to read the statute and I am going to define these matters that you are relating to, premeditation and malice.

"MR. SIEFER: All right."

Respondent thus respectfully suggests that, although the trial judge defined premeditation, deliberation and malice, the definitions were provided at the request of Petitioner's counsel. The instructions as a whole show the court did not instruct the jury that these were the elements of first degree murder which they must find in order to return a guilty verdict. Indeed, the instructions taken as a whole, *Mullaney* v *Wilbur*, 421 US 684 (1975), show the court specifically instructed the jury that it need not find intent to kill, but that it must find intent to rob (T-423-424). The court told the jury it had a double duty: (1) to decide if the defendant murdered Nicholas Zerr III, and (2) if the murder was committed during or while trying to commit a robbery. Thus, there are at least two reasons, why Respondent disagrees with Petitioner's claim that the trial court's instruction constructively amended the information and denied him fair notice of the charges against him.

First Respondent believes that reading the instructions as a whole shows the district court

only defined the concepts of premeditation, deliberation and malice for the jury as part of introducing the concept of the two kinds of first degree murder defined by MCL 750.316. The court did not "instruct" the jury it could find Petitioner guilty of first degree murder in this case on a theory of premeditated murder. Second, the definitions of premeditation, deliberation and malice were given with Petitioner's consent, and likely at his urging (T-410-411; 440-448). Thus Petitioner should not be heard to complain. This finding by the Michigan Court of Appeals (*People* v *Logan*, No. 23808), should be given the presumption of correctness. 28 USC 2254(d) and *Sumner* v *Mata*, 455 US 591 (1982).

In addition, there are alternative grounds for this issue to be decided. Procedurally this Sixth Amendment question was originally raised in Petitioner's appeal of right to the Michigan Court of Appeals. *People* v *Logan*, Michigan Court of Appeals No. 23808, decided August 25, 1976. When the Michigan Court of Appeals remanded that case back to the trial court for entry of a judgment of second degree murder or retrial on the original charge of first degree murder, Petitioner did not seek leave to appeal any undecided question. The Petitioner stood by and accepted the prosecutor's decision to entry of a judgment of second degree murder.

Respondent submits that by accepting a judgment of second degree murder without objections, Petitioner waived the non-jurisdictional claims arising out of the plea, just as a state criminal defendant who pleads guilty may only attack the voluntary and intelligent nature of his plea, Petitioner in this case should be deemed to have waived this claim of an instructional error. See generally, *Tollett* v *Henderson*, 411 US 258 (1973). When he took a further appeal to the Michigan

Court of Appeals and raised this issue again (Michigan Court of Appeals No. 59790, 69696 and Michigan Supreme Court No. 72197) the Macomb County Prosecutor relied on the law of the case doctrine,[1] arguing that Michigan law prohibits a legal question already raised in one appeal from being raised again in a subsequent appeal after proceedings on remand. *People* v *Jones*, 394 Mich 434 (1975); *People* v *Drew*, 83 Mich App 57 (1978); *People* v *Paintman*, 92 Mich App 412 (1979); *People* v *Hamm*, 100 Mich App 429, 438 (1980); *People* v *Prophet*, 101 Mich App 618, 625 (1980). This claim should therefore be deemed procedurally barred.

No basis for excusing the procedural default has been presented in any court by Petitioner. Since the cause and prejudice requirement of *Wainwright* v *Sykes*, 433 US 72 (1977); *Engle* v *Isaac*, 456 US 107 (1982); *Reed* v *Ross*, 468 US 1 (1984); *Murray* v *Carrier*, 477 US ___; 106 S Ct ___; 91 L Ed 2d 397 (1986); *Smith* v *Murray*, ___ US ___; ___ S Ct ___; 92 L Ed 2d 437 (1986), applies to appellate defaults as well as those at trial, Petitioner's procedural default should also bar habeas review of this claim.

It is further important to recognize the Michigan Court of Appeals found that the trial judge was merely giving the jury a "background explanation of murder theory under Michigan law." *People* v *Logan*, No. 23808, p. 2). Since this finding of no error under state law involves only an issue of state law, it should not be cognizable in a federal habeas corpus proceeding. *Combs* v *Tennessee*, 530 F2d 695 (CA 6, 1976).

Finally, notwithstanding the reasons set forth to this point, the district court arrived at the right result by concluding that Petitioner was not prejudiced as a result of the court's explanation of premeditated murder. Essentially, the district

court concluded that the trial court had constructively amended the information by the instruction at issue, thereby depriving Petitioner of defending the charges against him. The district court however, concluded that Petitioner was not prejudiced because his "defense was not compromised by the 'constructive amendment.'"[2] Even more significant is that Petitioner stands convicted of second degree murder as a result of the Michigan Court of Appeals' action. His claim is or should be moot as a result of his accepting the reduction of the verdict to second degree murder, and should not present a basis for habeas relief.[3]

II.

THE REFUSAL OF THE TRIAL COURT TO GIVE A MANSLAUGHTER INSTRUCTION WHERE THE FACTS SHOW THAT THE VICTIM WAS KILLED BY THE PETITIONER WITH A LOADED GUN DURING A PLANNED DELIBERATE ROBBERY DID NOT DEPRIVE PETITIONER OF DUE PROCESS.

Petitioner argues that even though the evidence adduced at trial would support a verdict of felony murder, "there was also evidence which would have supported a jury instruction on the lesser included offense of manslaughter." Petition for Certiorari, p. 17. He cites in support of this claim both his voluntary intoxication and his claim of "imperfect self-defense" which he alleges were raised by him at trial, *Id.*

Petitioner first contends that his voluntary intoxication would provide a basis for instructing the jury on manslaughter. He cites *People* v *Droste*, 160 Mich 66, 79 (1910), to support the claim. *Droste* involved a charge of premeditated murder. Petitioner cites no felony murder case to support his claim. Michigan defines felony murder as second degree murder committed during the perpetration or attempt to perpetrate any of eight separate felonies, including armed robbery. In order for intoxication to be a defense here, it would be necessary for Petitioner to claim he was so intoxicated he was not conscious of what he was doing, or why he was doing it. *People* v *Kelley*, 21 Mich App 612, 622 (1970). Michigan law further recognizes that where a person forms the requisite intent while sober and becomes intoxicated so as to fortify the resolve to commit the crime,

intoxication is not a defense. *Id.* Finally, under Michigan law voluntary intoxication is not a defense to second degree murder. *People* v *Langworthy*, 416 Mich 630 (1982). Petitioner's claim of intoxication does not support a manslaughter theory in this case.

Second, Petitioner misplaces his reliance on *People* v *Springer*, 100 Mich App 418 (1980), through which he claims the theory of "imperfect" self-defense under Michigan law. In *Springer*, the defendant was the initial aggressor and his aggression did not include the display of armed force. Springer's initial aggression was later completely overshadowed by the sudden appearance of two armed men. The facts there showed Springer did not anticipate the escalation of the force which occurred. Hence, the state court found the imperfect self-defense available. In the instant case, Petitioner was not only an armed aggressor, but he and his accomplice each wielded life-threatening weapons to affect a planned robbery. He was properly held responsible for his response to the victim's legal use of retaliating force under Michigan law and not entitled under these facts to any hybrid self-defense theory. *People* v *Podolski*, 332 Mich 508 (1952).

The district court, after reciting the facts as determined in the original appeal, agreed concluding that "the facts before the jury show a planned and deliberate robbery with a loaded gun in the course of which the owner of the Tasty Tim Ice Cream Company was fatally shot by this [Petitioner]." 778 F2d at 283, 284. The district court found that given those facts, the failure to give a manslaughter instruction was at best harmless error which did not prejudice Petitioner. *Chapman* v *California*, 386 US 18 (1967).

Further, in view of Petitioner's own testimony that he knew the victim (T-343, 345), that he

intended to rob the victim's business using the loaded weapon and that (T-352, 353) he shot the victim because:

(Mr. Logan)

"A. He (the deceased) pulled the gun on me and I didn't -- if he would have told me to drop it, I would have dropped it, but he -- I didn't have no choice."

(Prosecuting Attorney)

"Q. What did he tell you? What did Mr. Zerilli tell you?

"A. He didn't tell me anything. He told -- he told Ray to freeze, but he didn't tell me anything.

"Q. He told Ray what?

"A. To freeze.

"Q. What does freeze mean to you to what would it mean to you have heard it?

"A. Stop.

"Q. Freeze is analogous to stop, so what he said to Ray in your presence was stop, wasn't it?

"A. Yes.

"Q. What did you read into that statement that would make you shoot a man because you were in jeopardy that he was going to shoot you?

"A. He said that at the same time that I was right in his line of fire.

"Q. Do you feel that a man has a right to protect his premises with a weapon, Mr. Logan?

"A. Yes.

"Q. And you were on those premises with the intent to rob with an armed rifle, and yet you say to this jury that you shot him in self-defense; is that correct?

"A. If I would have knew he had a gun, I would have not done it.

"Q. But if he did not have a gun, you would have done it, is that correct?

"A. Yes.

"Q. So it was surprise to you that he had a gun?

"A. Yes, he was right on me. I had no choice."

and further that when Petitioner testified on direct examination that:

"A. We shot at the same time, about the same time." (T-344).

this result was proper.

Therefore, upon review of the facts of this case and the applicable state law, there was no evidentiary basis upon which support for the lesser included theory of manslaughter could be predicated. Petitioner was not denied a fair

trial and hence, no due process violation occurred. *Pilon* v *Bordenkircher*, 593 F2d 264, 267 n. 4 (CA 6, 1979), *vacated and remanded on other grounds*, 444 US 1 (1979).

Nor has Petitioner established that the federal constitution requires that a manslaughter instruction be given. Petitioner relies on *Beck* v *Alabama*, 447 US 625 (1980) and *Keeble* v *United States*, 412 US 205 (1973), to establish that the due process clause compels the trial court to instruct on lesser included offenses upon the request of the accused. *Beck* did not so hold. What this Court actually stated in *Beck, supra*. was:

> "While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard."

Implicit in the *Beck* decision is the recognition that this "procedural safeguard" does not spring from the federal constitution. Rather, it arises solely from the practice of instructing on lesser included offenses universally employed by both the federal and state courts.

Moreover, both in *Beck* and *Keeble*, the Supreme Court held that this "procedural safeguard" does not entitle the accused to have the jury instructed on every lesser offense he wishes. To the contrary, the rule only encompasses those lesser included offenses rationally supported by the evidence adduced at trial. In footnote 12 of *Beck* this Court specifically noted that this rule

had been adopted in Michigan as well as every jurisdiction which has addressed the issue. From this it is clear that there is no constitutional due process right to instructions on lesser included offenses.

Since manslaughter is not a necessarily included offense within the crime of murder under Michigan law, *People* v *VanWyck*, 402 Mich 226 (1978), and since the evidence does not support a manslaughter theory, Petitioner has not established a valid basis for habeas relief.

Finally, procedural default bars litigation of this claim on habeas relief. The Michigan Court of Appeals in its original opinion, reversed the conviction and remanded this case to the trial court, giving the prosecutor the option to a retrial or to entry of a judgment of second degree murder on the basis of the Michigan Supreme Court's holding in *People* v *Carter*, 395 Mich 434 (1975), which was decided while Petitioner's case was on appeal. Petitioner did not appeal this ruling of the Michigan Court of Appeals to the Michigan Supreme Court. Any issue decided by the Michigan Court of Appeals in that original appeal became the law of the case. *People* v *Whisenant*, 384 Mich 693 (1971). Petitioner then acquiesced in the entry of the reduced second degree murder verdict. This affirmative choice by Petitioner, Respondent submits, forecloses any challenge to the failure to give a manslaughter instruction at trial on procedural grounds.

In Argument I, *infra*, Respondent argues that Petitioner has procedurally defaulted by failing to appeal the original Michigan Court of Appeals ruling and acquiescing in the reduction to second degree murder. The same procedural default should bar this claim from habeas relief absent a showing of cause and prejudice, at which no attempt has

been made. *Wainwright* v *Sykes*, *supra*; *Reed* v *Ross*, *supra*; *Murray* v *Carrier*, *supra*; *Smith* v *Murray*, *supra*. Hence habeas review would properly be denied upon this alternative ground as well.

For all the foregoing reasons, certiorari should be denied upon this claim.

RELIEF

WHEREFORE, for the foregoing reasons the Respondent prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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FOOTNOTES

[1]The record shows there was no objection to the explanation of the elements of premeditated murder at trial. *People* v *Trammel*, 20 Mich App 351 (1976) requires an objection at trial before alleged instructional errors will be considered on appeal absent manifest injustice. Further, the record suggests that this was a strategic choice of counsel. Although Respondent does not pass judgment upon the motives of counsel, requesting that the jury be instructed on premeditated murder and not objecting to an explanation of the elements of premeditated murder (even though the jury would not be instructed that they must or even could consider these elements and base a first degree murder verdict upon a finding of these elements) suggests that confusing the jury or building in error or both was the tactic utilized by Petitioner's counsel. Requiring parties to fulfill the state procedural requirements is one way of preventing the "sandbagging" of issus. See *Wainwright* v *Sykes*, 433 US 72, 89 (1977); *Engle* v *Isaacs*, 456 US 107 (fn 34) (1982).

[2]The Macomb prosecutor relied upon this argument in his brief in the Michigan Court of Appeals (see brief of Macomb County prosecutor, Michigan Court of Appeals No. 59790, page 2), wherein it stated:

> "The People would concur with the statute, the court rule and case law that finality must at some point come to each case. It is unconscienable to continually reopen a case to rehash the same arguments. ... This issue was presented to this Honorable Court over five years ago and no new evidence has been presented to alter this Court's disposition made at that point. *The decision made then,*

acquiesced in and unappealed by the defendant, stands as the law of the case. People v *Drew*, 83 Mich App 57; 268 NW2d 284 (1978). Consequently, the defendant's requst should be denied." (Emphasis added).

[3]The court found that:

"Even if premeditated murder had been included in the indictment, Petitioner could not have done anything differently which would have altered the results of the trial. His intoxication defense was appropriate for rebutting the intent elements of either premeditated or felony murder. This Court notes that in any event there was ample evidence for a conviction on either charge. Thus, Petitioner's third claim constitutes harmless error." (Mem Op II, p. 10).

Thus in view of the overwhelming evidence against Petitioner, the harmless error test of *Chapman* v *California*, 386 US 18 (1967) would govern.